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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

UNITED STATES OF AMERICA,
Petitioner,
v.
ALFONSO LOPEZ, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, JOINED BY THE NATIONAL SCHOOL BOARDS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Commerce Clause of the Constitution empowered Congress to enact 18 U.S.C. § 922(q), which makes it a federal offense to possess a firearm in or within 1000 feet of a school.

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, JOINED BY THE NATIONAL SCHOOL BOARDS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*

Amici National Conference of State Legislatures, National Governors' Association, National League of Cities, National Association of Counties, International City/County Management Association, and National Institute of Municipal Law Officers (NCSL *et al.*) are organizations whose members include state and local governments and officials throughout the United States. These *amici* have a compelling interest in the legal issues that affect state and local governments and in the proper working of our federal system.

Amici NCSL *et al.* view with utmost seriousness the problem posed by criminal behavior in our society, and the tragedy of the possession and use of guns in schools. Indeed, Texas has criminalized the possession of a gun in a school since 1974, long before the Gun-Free School Zones Act was enacted, and respondent was prosecuted by state authorities under this state law before the federal prosecution was commenced. Pet. App. 2a n.1.

There are, however, fundamental constitutional questions presented by this case that must be addressed despite the sensitivity of the context in which they arise. It is axiomatic that "our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2399 (1991). And while Congress's power to regulate activity under the commerce clause is without question very

broad, it is not unlimited. *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 125 (1942). When Congress legislates at what are, at best, the outer limits of its commerce power, meaningful judicial review of whether that exercise is within Congress's delegated powers is essential if our federal system is to be preserved.

Amici NCSL *et al.* are also concerned that the growing trend toward the unbounded federalization of what have hitherto been state criminal offenses will undermine the working of our federal system in other ways. The identification and proscription of criminal conduct has, since the founding of our nation, been one of the principal concerns of the States. Shifting the focus of this lawmaking from the States to Congress erodes essential features of our federal system. *See Gregory*, 111 S.Ct. at 2399.

The National School Boards Association (NSBA) is a federation of state school boards associations, representing approximately 97,000 of the nation's school board members who, in turn, govern the schools attended by 97 percent of all U.S. public school children. NSBA is deeply concerned about violence and crime in and around the schools and has recently published a guide on effective methods to curb violence in public schools. But redundant federal laws do not address the problem of violence in the schools—they simply make administration of the schools more difficult and could cause delays in bringing perpetrators to justice.

Education in the nation's public schools has long been the function of state and local governments. Accordingly, *amicus* NSBA is concerned with the United States' reliance on findings made in connection with legislation enacted under the spending power to support its argument that education substantially affects interstate commerce. Because state participation in spending programs is voluntary, such findings do not support expansive federal regulation of the public schools under the commerce clause.

Because of the importance of these issues to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT

On March 10, 1992, respondent Alfonso Lopez, Jr., a student at Edison High School in San Antonio, Texas, arrived at school carrying a concealed .38 caliber handgun. Acting on an anonymous tip, school officials confronted Lopez, who admitted he was carrying the gun. The officials seized the gun (which was not loaded) and five bullets. Pet. App. 2a.

State authorities immediately charged Lopez with violating Section 46.04(a)(1) of the Texas Penal Code. Like many similar state laws, this statute makes it a felony for a person to go "on the premises of a school or an educational institution" while carrying a firearm, and carries a punishment of up to ten years imprisonment and a $10,000 fine.[2] Tex. Penal Code § 46.04(a)(1); *id.* § 12.34. The state charges were dismissed, however, after a federal grand jury indicted Lopez for violating 18 U.S.C. § 922(q), the Gun-Free School Zones Act of 1990. Pet. App. 2a n.1.

The federal indictment did not allege that the firearm Lopez possessed had any nexus to interstate commerce and the United States conceded that Lopez's conduct was

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

[2] The brief *amicus curiae* of various members of Congress baldly asserts that "[t]he Gun-Free School Zones Act represents the first effort to address the growing crisis of guns in schools and the related problems of drugs and gang activity." Br. *Am. Cur.* 16 Members of the U.S. Senate *et al.* 6 (citation omitted). In contrast to the Gun-Free School Zones Act which was enacted in 1990, *see* 104 Stat. at 4968, Texas has proscribed the conduct charged here for more than twenty years. *See* Tex. Penal Code § 46.04(a)(1). Forty States have such laws. *See* Appendix hereto. Many of these laws were enacted before the Gun-Free School Zones Act.

purely intrastate in nature. Pet. App. 50a-53a. Moreover, by its terms, Section 922(q) does not require that the United States prove a nexus to interstate commerce. *See* 18 U.S.C. § 922(q). Nonetheless, the district court denied Lopez's motion to dismiss the indictment, reasoning that the Gun-Free School Zones Act was "a constitutional exercise of Congress' well-defined power to regulate activities in an[d] affecting commerce." Pet. App. 55a. Thereafter, the court convicted Lopez and sentenced him to six months imprisonment, to be followed by two years of supervised release. Pet. App. 3a.

The court of appeals reversed. The court recognized that under the commerce clause, Congress has the power to regulate purely intrastate activity which has a substantial effect on commerce. *See* Pet. App. 37a-39a. The court also recognized that this Court "has consistently deferred to Congressional findings in this respect," *id.* at 40a, and that "the courts must defer 'if there is any rational basis for' the finding." *Id.* at 43a (citation omitted). The court concluded, however, that it could not "properly perform [its] duty to determine if there is any rational basis for a Congressional finding if neither the legislative history nor the statute itself reveals any such relevant finding." *Id.* at 44a.

The court also reasoned that in the absence of a finding, "there is nothing to indicate that Congress itself consciously fixed, as opposed to simply disregarded, the boundary line between the commerce power and the reserved power of the states." *Id.* Because "both the management of education, and the general control of simple firearms possession by ordinary citizens, have traditionally been a state responsibility and section 922(q) indisputably represents a singular incursion by the Federal Government into territory occupied by the States[,]" *id.* at 45a, findings were "necessary to demonstrate that such an exercise of power is within the scope of the Commerce Clause." *Id.* at 48a. Because neither Section 922(q) itself, nor its legislative history, contains any findings that the purely intrastate activity it proscribes substantially

affects interstate commerce, the court of appeals vacated respondent's conviction. *Id.* at 54a.

SUMMARY OF ARGUMENT

1. "[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government[,]" granting to the latter only "limited powers." *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2399 (1991). Under our constitutional plan, "[t]he States possess primary authority for defining and enforcing the criminal law," *Engle v. Isaac*, 456 U.S. 107, 128 (1982), and the federal government has limited power to define and punish criminal activity. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821); *Keller v. United States*, 213 U.S. 138, 144 (1909).

While an offense may be created and "punished by Congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers," *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 78 (1838), Congress can criminalize activity under the necessary and proper clause only when it is pursuing an end which is clearly within its enumerated powers. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819); *see also Coombs*, 37 U.S. (12 Pet.) at 75. The Court has also made clear that Congress cannot exercise authority not granted to it under the pretext of exercising its enumerated powers. *McCulloch*, 17 U.S. (4 Wheat.) at 423.

2. Congress's power to criminalize activity under the commerce clause is limited by that clause's real and substantial limits. Thus, while Congress can regulate "activity that is purely intrastate in character," *Fry v. United States*, 421 U.S. 542, 547 (1975), that activity must " 'so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of [it] appropriate means to the attainment of a legitimate end.' " *Perez v. United States*, 402 U.S. 146, 151 (1971) (citation omitted). As the Court noted in *Wickard v. Filburn*, 317 U.S. 111, 125 (1942), local activity may be regu-

lated pursuant to the commerce power only "if it exerts a substantial economic effect on interstate commerce." *Accord Perez*, 402 U.S. at 151-52. The Court has never gone so far as to "declare[] that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968).

As a regulation of purely intrastate activity, the Gun-Free School Zones Act does not meet these standards. Neither the Act nor the legislative history of the Crime Control Act of 1990 (of which the Gun-Free School Zones Act was a part) contains any reference to the effect on interstate commerce of gun possession in the schools. *See* Crime Control Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4844-45; H.R. Rep. No. 101-681(I), 101st Cong., 2d Sess. 69 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472. Although the Act was the subject of hearings by a House subcommittee, the testimony and other evidence received at that proceeding does not establish that firearms possession in the schools has a substantial effect on interstate commerce.

3. Recognizing that Congress, in enacting the Gun-Free School Zones Act, failed to make any findings regarding the impact of gun possession in and around schools on interstate commerce and that the legislative record is devoid of any evidence of an impact on interstate commerce, the United States argues that "judicial inquiry into the rationality of legislation 'must be restricted to the issue whether any state of facts either known *or which could reasonably be assumed* affords support for it.'" Pet. Br. 16 (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938)) (emphasis added). This argument substitutes judicial surmise for legislative factfinding and requires nothing less than the abdication of meaningful judicial review. It also confuses the standard for reviewing the rationality of legislative *means* with that for determining whether legislation is a permissible *end* of the commerce power.

At issue here, however, is not whether Congress has chosen a lawful means to effectuate a concededly valid goal, but whether it has the power to act at all. Precisely because congressional regulation of purely intrastate activity involves the exercise of the commerce power at its outer limits, the Court has recognized that "the mere fact that Congress has said when a particular activity shall be deemed to affect commerce does not preclude further examination by this Court." *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964); *see also Hodel v. Virginia Surface Mining & Reclamation Assoc.*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring). Moreover, in reviewing congressional regulation of purely intrastate activity, the Court has engaged in a searching review of the legislative record to determine that a rational basis exists for concluding that a regulated class of activity has a substantial effect on interstate commerce. *See Hodel*, 452 U.S. at 277-80; *Perez*, 402 U.S. at 155-56; *Katzenbach*, 379 U.S. at 299-301; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-53 (1964).

Moreover, the Court has never suggested that in assessing the validity of Congress's exercise of power under the commerce clause, courts should assume that a state of facts exists to support it. While courts properly assume a state of facts when assessing the rationality of legislative means, *see FCC v. Beach Communications*, 113 S. Ct. 2096, 2101-02 (1993), this is because the necessary and proper clause grants Congress broad discretion to enact "all means which are appropriate, [and] which are plainly adapted to" a legitimate end. *McCulloch*, 17 U.S. (4 Wheat.) at 421. But it does not extend to the question of the validity of the end itself. The extreme and unwarranted deference on the question of legislative ends urged by the United States is antithetical to a constitutional system which "created a Federal Government of limited powers." *Gregory*, 111 S. Ct. at 2399.

4. The requirement that Congress establish in the legislative record that purely intrastate activity it is crim-

inalizing has a substantial effect on interstate commerce is also supported by the substantial costs which the federalization of traditional state crimes imposes on the federal-state balance and rights granted under state law. Because federalization offers the promise of a federal solution, it diminishes the political accountability of state and local officials and institutions. *See* Roger J. Miner, *Federal Courts, Federal Crimes, And Federalism*, 10 Harv. J.L. & Pub. Pol'y 117, 127 (1987). Moreover, federalization imposes a significant threat to the States' sovereign choices and individual liberty. Many States have exercised their "sovereign right to adopt in [their] own Constitution[s] individual liberties more expansive than those conferred by the Federal Constitution." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). Even where, as here, charges brought under the Act merely duplicate a state prosecution, the Act threatens individual liberty because the rules of decision are provided by federal law and therefore preempt state decisions to grant their citizens more expansive fundamental liberties than those provided by the federal bill of rights.

ARGUMENT

A. The Constitution Grants Congress Only Limited Authority To Define And Punish Criminal Activity

It is axiomatic that "[t]he Constitution created a Federal Government of limited powers." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991); *see also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). Accordingly, "our Constitution establishes a system of 'dual sovereignty between the States and the Federal Government." *Gregory*, 111 S. Ct. at 2399. As James Madison wrote:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the

> objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state.

The Federalist No. 45, at 296 (Isaac Kramnick ed. 1987) (J. Madison); *see also* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

By establishing a system of dual sovereignty and limited federal power, the framers sought to diffuse power in order to protect the people from tyranny. As the Court reaffirmed in *Gregory*, "[t]he 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the framers to ensure the protection of 'our fundamental liberties.'" 111 S. Ct. at 2400 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting))); *see also Coleman v. Thompson*, 111 S. Ct. 2546, 2570 (1991) (Blackmun, J., dissenting) ("federalism secures to citizens the liberties that derive from the diffusion of sovereign power"). Thus, by dividing power between the States and the federal government, our Constitution "reduce[s] the risk of tyranny and abuse from either front." *Gregory*, 111 S. Ct. at 2400.[3]

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[3] As James Madison wrote:

> In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

The Federalist No. 51, at 321.

As a textual matter, the Constitution expressly grants authority to the federal government to define and punish criminal activity in only five instances.[4] These limited grants of power demonstrate that the Constitution does not grant Congress a general authority to define and punish criminal activity.[5] Thus, under our constitutional scheme, "[t]he States possess primary authority for defining and enforcing the criminal law." *Engle v. Isaac*, 456 U.S. 107, 128 (1982); *see also Patterson v. New York*, 432 U.S. 197, 201 (1977). As the Court has recognized, "congress cannot punish felonies generally." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821); *see also id.* at 426 ("Congress has . . . no general right to punish murder committed within any of the states."); *cf. Keller*

[4] Article I thus expressly grants Congress the power "[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States," art. I, § 8, cl. 6; "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," *id.*, cl. 10; "[t]o make Rules for the Government and Regulation of the land and naval Forces," *id.*, cl. 14; and "[t]o exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia and federal reservations. *Id.*, cl. 17; *see also Cohens*, 19 U.S. (6 Wheat.) at 426 ("Congress has a right to punish murder in a fort, or other place within its exclusive jurisdiction; but no general right to punish murder committed within any of the states."). Likewise, Article III defines the crime of "Treason against the United States" and grants to Congress the "Power to declare [its] Punishment. . . ." U.S. Const. art. III, § 3.

[5] The federal government's limited role in defining and punishing criminal activity is also demonstrated by the framers' decision not to grant the federal courts the power to create and punish "common-law offenses against the United States." *United States v. Eaton*, 144 U.S. 677, 687 (1892); *United States v. Britton*, 108 U.S. 199, 206 (1883) (same); *see also Cotton v. United States*, 52 U.S. (11 How.) 229, 231 (1850). This stands in stark contrast to the practice in the United Kingdom, whose courts have long exercised such powers, *see, e.g., Shaw v. Director of Pub. Prosecutions*, 1962 App. Cas. 220, 266-69 (H.L. 1961) (Op. of Viscount Simonds); *Rex v. Curl*, 93 Eng. Rep. 849, 851 (K.B. 1727), and in the States themselves. *See* 1 Joel P. Bishop, *Commentaries on The Criminal Law* § 35 & n.1. (Williams S. Hein Co. 1986) (7th ed. 1882).

v. United States, 213 U.S. 138, 144 (1909) ("there is in the Constitution no grant . . . to Congress" of the police power).

To be sure, Congress's power to define and punish criminal activity is not limited to these textually explicit grants. At least since *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 78 (1838), the Court has recognized that an offense may be created and "punished by congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers." The numerous federal offenses contained throughout the United States Code are a strong testament to Congress's broad power to criminalize activity under the necessary and proper clause.

Nonetheless, Congress can criminalize activity under the necessary and proper clause *only* when it is pursuing an end which is clearly within its enumerated powers.[6] *See McCulloch*, 17 U.S. (4 Wheat.) at 421, 423. Since *McCulloch*, the Court has repeatedly reaffirmed that Congress, in creating and punishing criminal offenses, cannot exceed its delegated powers. For example, before construing the criminal statute at issue in *Coombs* the Court stated:

> [I]t seems highly important, if not indispensable, to say a few words as to the constitutional authority of congress to pass the same. For if, upon a just interpretation of the terms thereof, congress have exceeded

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[6] As the Court stated in *McCulloch*:

> [W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional . . . .

17 U.S. (4 Wheat.) at 421.

> their constitutional authority, it will become our duty to say so, and to certify our opinion on the points submitted to us, in favor of the defendant.

37 U.S. (12 Pet.) at 75. *See also Perez v. United States*, 402 U.S. 146, 146-47 (1971); *United States v. Darby*, 312 U.S. 100, 118 (1941); *Hodges v. United States*, 203 U.S. 1, 16-20 (1906).

Consistent with this principle, the Court has repeatedly construed federal criminal statutes to confine Congress to its constitutional powers. *See, e.g., United States v. Bass*, 404 U.S. 336, 347-51 (1971); *United States v. Five Gambling Devices*, 346 U.S. 441, 446-49 (1953) (Jackson, J.; joined by Frankfurter & Minton, JJ.); *Coombs*, 37 U.S. (12 Pet.) at 75 ("[I]f the section admits of two interpretations, one of which brings it within, and the other presses it beyond, the constitutional authority of congress, it will become our duty to adopt the former construction; because a presumption never ought to be indulged, that congress meant to exercise or usurp any constitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous.").

Thus, in *Bass* the Court affirmed the reversal of a conviction obtained under 18 U.S.C App. § 1202(a), which prohibited a convicted felon from "receiv[ing], possess[ing], or transport[ing] in commerce or affecting commerce . . . any firearm." 404 U.S. at 337-39. In *Bass*, the United States neither alleged in the indictment nor showed at trial that the firearms possessed by Bass "had been possessed 'in commerce or affecting commerce.'" *Id.* at 338. Recognizing that "[a]bsent proof of some interstate commerce nexus in each case, § 1202(a) dramatically intrudes upon traditional state criminal jurisdiction," the Court interpreted that statute to prohibit conviction absent proof by the United States that the gun Bass possessed "was moving interstate or on an interstate facility, or if the possession affects commerce." *Id.* at 350.

B. The Commerce Clause Does Not Authorize Congress's Enactment Of The Gun-Free School Zones Act

As the foregoing demonstrates, Congress's power to criminalize activity under the commerce clause is limited by the scope of that power. Although this Court has sanctioned a broad use of the commerce power, its decisions nonetheless make clear that the commerce clause has real and substantial limits. Were it otherwise, it would be meaningless to speak of a "Federal Government of limited powers." *See Gregory*, 111 S. Ct. at 2399.

Accordingly, while Congress can regulate "activity that is purely intrastate in character," *Fry v. United States*, 421 U.S. 542, 547 (1975), that activity must, as the United States acknowledges, *see* Pet. Br. 12, " 'so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of [it] appropriate means to the attainment of a legitimate end.' " *Perez v. United States*, 402 U.S. 146, 151 (1971) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)). As the Court noted in *Wickard v. Filburn*, 317 U.S. 111, 125 (1942), local activity may be regulated under the commerce power only "if it exerts a substantial economic effect on interstate commerce." *Accord Perez*, 402 U.S. at 151-52; *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964). Where Congress regulates a class of activities, which in the aggregate substantially affects interstate commerce, "the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez*, 402 U.S. at 154 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)). But the Court has never gone so far as to "declare[] that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Wirtz*, 392 U.S. at 196 n.27.

The Court has also long made clear that Congress cannot exercise authority not granted to it by the Con-

stitution under the pretext of exercising its enumerated powers. As the Court stated in *McCulloch*:

> [S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government[,] it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.

McCulloch, 17 U.S. (4 Wheat.) at 423. Thus, in order to criminalize conduct under the commerce clause, Congress must be regulating interstate commerce. Congress cannot, under the guise of regulating interstate commerce, legislate beyond its delegated authority. And Congress's regulation of intrastate activity must reach activity that has a real and " 'substantial economic effect on interstate commerce.' " *Perez*, 402 U.S. at 152 (quoting *Wickard*, 317 U.S. at 125).

The Gun-Free School Zones Act plainly does not meet these standards. The nature of the conduct it criminalizes (simple possession of a gun in or near a school) has no obvious connection to interstate commerce.[7] The Act itself, which was enacted as Section 1702 of the Crime Control Act of 1990, P.L. 101-647, 104 Stat. 4844-45, contains no findings concerning the effect of firearm possession in the schools on interstate commerce. *See id.* Nor did the report which accompanied the Crime Control

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[7] *Bass* suggests that Lopez's conviction could be sustained if the United States had proved that the firearm Lopez possessed had a nexus to interstate commerce. *See* 404 U.S. at 350. *Amici* acknowledge that the parties stipulated below that an agent of the Bureau of Alcohol, Tobacco and Firearms was prepared to testify that Lopez's firearm was manufactured outside of Texas. *See* Pet. App. 53a. The indictment, however, did not allege that Lopez's offense had any nexus to interstate commerce. *See id.* Because an indictment cannot be amended except by the grand jury itself, and this variance between the allegations of the indictment and this portion of the government's proof would be substantial, Lopez's conviction cannot be sustained on that ground. *See Stirone v. United States*, 361 U.S. 212, 215-19 (1960). Accordingly, Lopez's conviction can only be sustained if gun possession in and around schools substantially affects interstate commerce.

Act discuss the impact on interstate commerce caused by firearms in the schools. *See* H.R. Rep. No. 101-681(I), 101st Cong., 2d Sess. 69 (1990), *reprinted* in 1990 U.S.C.C.A.N. 6472. Indeed, as the court of appeals noted, the report did not "even mention the Gun-Free School Zones Act." Pet. App. 34a; *see also* H.R. Rep. No. 101-681(I). Moreover, while the Act was the subject of a hearing by a House subcommittee, this hearing does not remotely establish that firearms possession in the schools has a substantial effect on interstate commerce. Indeed, the legislative record indicates that Congress did not view itself as doing anything other than regulating violent criminals. *See generally Gun-Free School Zones Act of 1990: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990) (*Hearing*).

It is noteworthy that the United States does not attempt to support the Act based on the statistical evidence received at the hearing. While these statistics unquestionably document individual instances of human tragedy, this alone does not render the underlying activity a permissible end of Congress's power to regulate interstate commerce.[8] *See, e.g., Cohens*, 19 U.S. (6 Wheat.) at 426 ("Congress has no general right to punish murder committed within any of the states."). Rather, under our constitutional scheme, "[t]he States possess primary authority for

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[8] *Amici* Center to Prevent Handgun Violence *et al.* recount that "sixty-five students and six school employees—were killed with guns at schools" and 201 persons were wounded during the academic years 1986-90. *See* Br. *Am. Cur.* Center to Prevent Handgun Violence *et al.* 19. But with the national population of students, teachers, and employees exceeding fifty million people, *see* U.S. Bureau of the Census, *Statistical Abstract of the United States 1993* 148 (1993) (Table No. 223); *id.* at 162 (Table No. 248), these tragedies, even when aggregated over a four year period, do not demonstrate a substantial effect on interstate commerce. Indeed, statistics provided at the hearing indicated that fifteen States had no incidents and that more than half the incidents occurred in only six States. *See Hearing* at 82-83.

defining and enforcing the criminal law." *Engle*, 456 U.S. at 128.

Rather than rely on the statistical evidence presented at the hearing, the United States seeks to sustain the statute by arguing that "[t]he economic consequences of criminal behavior are substantial and, through the mechanism of insurance, spread throughout the population." Pet. Br. 17 (citing *United States v. Evans*, 928 F.2d 858, 862 (9th Cir. 1991)) (footnote omitted). Contrary to the United States' suggestion, this "rather tenuous nexus," *Evans*, 928 F.2d at 862, is insufficient to support the broad police power which the United States urges this Court to sanction. *See* Pet. Br. 44. Long before this nation's founding, insurers were underwriting the perils associated with crime through life and fire insurance policies. *See* George Richards, *A Treatise on the Law of Insurance*, §§ 8-9 (2d ed. 1904). Nonetheless, the spreading of risk through the mechanism of insurance has never been viewed as being a sufficient justification for the federalization of traditional intrastate crimes. And for good reason: such a principle would have no limit and would negate the structural protections of our federal system.[9]

Amici understand the tragedy which each incident of gun violence in the schools involves. But the tragedy is

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[9] The Center to Prevent Handgun Violence also asserts that because the aforementioned firearm incidents cost society approximately $33.5 million dollars over a four year period, Congress would have been justified in "determin[ing] that gun possession in and around schools affects interstate commerce." *See* Br. *Am. Cur.* Center to Prevent Handgun Violence *et al.* 20. Congress, of course, made no such determination. In any event, when Congress regulates purely intrastate activity, the standard is not merely whether the activity affects commerce but whether it has a substantial economic effect on interstate commerce. *See, e.g., Wickard*, 317 U.S. at 125; *Perez*, 402 U.S. at 151-52. This cost ($8.5 million annually) is approximately .00014% of the nation's annual Gross National Product of six trillion dollars. *See Budget of the United States Government: Fiscal Year 1994* 6.

one of violence against individuals, not interstate commerce. Unquestionably the act of striking down a congressional enactment is a serious one, to be taken only when circumstances clearly warrant. But there are other values at stake here as well, notably the preservation of our federal system. Accordingly, where the conduct criminalized by Congress bears no apparent connection to interstate commerce, and where neither Congress in the legislative process nor the federal government at trial has shown the impact of the conduct on commerce, the conviction must be invalidated on the ground that Congress has exceeded its commerce power.[10]

C. The United States' Standard Of Review Requires The Abdication Of Meaningful Judicial Review And Conflates The Standard For Determining The Validity Of Legislative Means With That For Determining Whether Legislation Is A Permissible End Of The Commerce Power

Recognizing that Congress, in enacting the Gun-Free School Zones Act, failed to make any findings regarding the impact of gun possession in and around schools on

[10] The United States also argues that Congress could rationally conclude that gun possession in the schools substantially affects interstate commerce because gun violence interferes with learning and the future productivity of students when they enter the work force. *See* Pet. Br. 19-25. While this cause and effect theory is not implausible, like the insurance theory it is a principle without limit and has no support in the legislative record. As a representative of the American Academy of Pediatrics testified, "Let me conclude by making a plea for the need for continuing to collect data—and I think that was also mentioned earlier this morning. The data is scarce and sketchy." *Hearing* at 52. This witness's prepared remarks stated:

> [S]ystematic and sustained attention to the problem has been lacking. Part of the reason for this is the scarcity of data concerning the involvement of children in the gun epidemic, and a lack of necessary detail in the data that are available. The Academy urges Congress to take steps to ensure that proper records are kept, so that the gravity of the situation can be properly assessed . . . .

Id. at 59-60.

interstate commerce, the United States argues that "the congressional 'finding' can very properly be—and often is—merely implicit in the enactment itself." Pet. Br. 17 n.8. In support of its notion that courts should imply such findings, the United States argues that " '[t]he pertinent inquiry therefore is . . . whether Congress could rationally conclude that the regulated activity affects interstate commerce,' " *id.* (quoting *Hodel v. Indiana*, 452 U.S. 314, 324 (1981)), and that "judicial inquiry into the rationality of legislation 'must be restricted to the issue whether any state of facts either known *or which could reasonably be assumed* affords support for it.' " Pet. Br. 16 (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938)) (emphasis added).

This argument, however, substitutes judicial surmise for legislative factfinding and requires nothing less than the abdication of meaningful judicial review. Moreover, it rests on the faulty premise that the standard for reviewing the rationality of legislative *means* is the same as that for determining whether legislation constitutes a permissible *end* of the commerce power. In this case the question is not whether Congress has chosen an appropriate means of carrying out a permissible goal, but whether Congress has the power to act at all.

Contrary to the United States' argument, the Court has recognized the necessity of a meaningful standard of review when called upon to decide whether congressional regulation of purely intrastate activities is consistent with the limits imposed by the commerce clause. Indeed, it is precisely because congressional regulation of purely intrastate activity (which has traditionally been the subject of state regulation) involves the exercise of the commerce power at its outer limits that a meaningful standard of review is necessary. Otherwise, Congress would be left to determine for itself the outer limits of its power. The Court has thus recognized that:

> Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this

> Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.

Katzenbach, 379 U.S. at 303-04. *See also Hodel*, 452 U.S. at 311 (Rehnquist, J., concurring) ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so. Congress' findings must be supported by a 'rational basis' and are reviewable by the courts."). Thus, in reviewing congressional regulation of purely intrastate activity, the Court has engaged in a searching review of the legislative record to determine whether a rational basis exists for concluding that regulated activity has a substantial effect on interstate commerce. *See Hodel*, 452 U.S. at 277-80; *Perez*, 402 U.S. at 155-56; *Katzenbach*, 379 U.S. at 299-301; *Heart of Atlanta Motel*, 379 U.S. at 252-53.

As these cases demonstrate, when Congress seeks to regulate purely intrastate activity, it must provide courts with a record which shows that the regulated activity has a substantial effect, and not just a trivial impact, on interstate commerce. In the absence of such a record, reviewing courts simply cannot determine whether Congress is exercising powers which the Constitution granted it.

By suggesting that courts should, in effect, speculate as to why Congress might have enacted a particular piece of legislation, the United States argues for no less than the abdication of the duty of federal courts, recognized since *McCulloch* and *Coombs*, to invalidate legislation which exceeds Congress's constitutional authority. *See, e.g., McCulioch*, 17 U.S. (4 Wheat.) at 423; *Coombs*, 37 U.S. (17 Pet.) at 75. The United States' reasoning is truly extraordinary given that one of the principal justifications for the judiciary's deference to legislatures is the latter's superior resources and factfinding ability. *See, e.g., City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 456 n.4 (1983) (O'Connor, J., dissenting).

The United States' position would result in courts upholding congressional action even when, in reality, the regulated activity has no substantial effect on commerce. And its practical consequence is to transform the commerce clause into a general police power, a power which the Constitution clearly did not grant to Congress. *See Keller*, 213 U.S. at 144; *Cohens*, 19 U.S. (6 Wheat.) at 428. The United States all but admits as much. Reasoning that because "[t]he economic consequences of criminal behavior are substantial and, through the mechanism of insurance, spread throughout the population," the United States argues that "Congress could rationally conclude that incidents of violent crime, wherever they occur, can be expected to affect the functioning of the national economy." Pet. Br. 17 (footnote omitted); *see also id.* at 44 ("we believe that violent crime *in general* imposes sufficient burdens on interstate commerce to permit Congress very broad latitude to enact measures rationally designed to reduce its incidence").

If, as the United States argues, Congress need only be capable of rationally concluding that particular activity "can be expected" to "affect the functioning of the national economy," *id.* at 17, then *every* crime can be federalized. Indeed, Congress could well make double parking a federal offense. *See, e.g.*, James L. Buckley, *Introduction—Federalism and the Scope of the Federal Criminal Law*, 26 Am. Crim. L. Rev. 1737, 1738 (1989) ("today it is virtually impossible to conjure up any human activity . . . that some court will not find to burden interstate commerce").[11]

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[11] Judge Buckley suggested that daydreaming might be a possible exception to his comment that almost all human activity will be held to burden interstate commerce. *See* 26 Am. Crim. L. Rev. at 1738. But under the United States' standard of review, a court reviewing a congressional prohibition of daydreaming would likely have to sustain the statute. It is, of course, entirely rational to assume that daydreaming reduces economic productivity and thus has a substantial effect on interstate commerce. *See* Pet. Br. 16 (arguing that "judicial inquiry into the rationality of legislation 'must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it' ")

The decisions of this Court, while admittedly establishing a principle of judicial deference to congressional enactments under the commerce power, have never gone so far as to suggest that courts should simply assume that a state of facts exists which supports a conclusion that a class of activities substantially affects interstate commerce. Thus, while the Court stated in *Katzenbach* that formal *findings* are not necessary to sustain legislation enacted under the commerce clause, *see* 379 U.S. at 299, there (as well as in the companion case, *Heart of Atlanta Motel*), Congress had made an extensive legislative *record* which was "replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants." *Id.*; *see also Heart of Atlanta Motel*, 379 U.S. at 252 (noting that "[w]hile the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce"); *id.* at 253 ("voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel").

Likewise, the Court's dictum in *Perez* that Congress need not "make particularized findings in order to legislate," 402 U.S. at 156, does not support the United States. Congress's authority to enact the loansharking statute challenged in *Perez* was amply supported by an extensive legislative record which included hearings and a report detailing loansharking's substantial effect on interstate commerce. *Id.* at 155-56. The Court's dictum merely recognized that, under these circumstances, the findings made by Congress were *pro forma* in nature. *Perez* thus provides no authority for the United States'

(quoting *Carolene Products*, 304 U.S. at 154). The absence of any legislative record evidencing daydreaming's substantial effect on interstate commerce would be no bar either, so long as a study or article could be found which would rationally support the conclusion that daydreaming substantially affects interstate commerce. *See* Pet. Br. 17 n.9 (quoting Ruttenberg, *The Limited Promise of Public Health Methodologies To Prevent Youth Violence*, 103 Yale L.J. 1885, 1887 n.11 (1994)).

assertion that courts should invent a rational basis for concluding that a regulated activity substantially affects interstate commerce.

Notwithstanding the *Perez* dictum, *amici* respectfully submit that Congress must make findings when it criminalizes purely intrastate conduct. Because decisions to regulate such activity have been traditionally the province of the States, findings serve a purpose analogous to the clear statement rule by ensuring that Congress "has in fact faced, and intended to" bring about "a significant change in the sensitive relation between federal and state criminal jurisdiction." *Bass*, 404 U.S. at 349. But "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Hodel*, 452 U.S. at 311 (Rehnquist, J., concurring). A legislative record is therefore also required to establish that the intrastate activity Congress is criminalizing does indeed have a substantial effect on interstate commerce. A record thus serves the critical function of demonstrating that Congress has not exceeded its constitutional authority.[12]

Ignoring the critical purpose that both findings and a record serve in judicial review of whether Congress is exceeding its powers, the United States argues that "judicial inquiry into the rationality of legislation 'must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it.'" Pet. Br. 16 (quoting *Carolene Products*, 304 U.S. at 154). This argument is flawed for several reasons.

As an initial matter, *amici* note that the statute at issue in *Carolene Products* prohibited the shipment of filled milk in interstate commerce. 304 U.S. at 146 & n.1. It

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[12] This is of particular importance where, as here, the activity Congress is criminalizing touches upon another area of traditional state and local authority—education. *See, e.g., Board of Ed. v. Rowley*, 458 U.S. 176, 208 n.30 (1982); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

therefore clearly was a permissible end of the commerce power.

Of greater significance, the United States simply conflates the standard for reviewing legislative means with that for determining whether the legislation constitutes a permissible end of congressional power. The two, however, are not the same. As the Court noted in *McCulloch*, the necessary and proper clause vests in the Congress broad discretion to enact "all means which are appropriate, which are plainly adapted to" a "legitimate" end. 17 U.S. (4 Wheat.) at 421. Courts must thus grant Congress broad deference in reviewing the means it has adopted in pursuit of its constitutionally authorized ends. But such deference does not extend to reviewing the question of whether Congress has acted within the scope of its constitutionally delegated powers. As stated above, the Constitution does not grant Congress broad discretion to legislate under the authority of a police power for the general welfare, *see Keller*, 213 U.S. at 144, or to punish felonies generally. *Cohen*, 19 U.S. (6 Wheat.) at 428. Rather, its authority is limited to its delegated powers and those "end[s]" which are "legitimate, [and] within the scope of the constitution." *McCulloch*, 17 U.S. (4 Wheat.) at 421. Extreme and unwarranted deference to Congress on the question of ends, rather than means, is antithetical to a constitutional system which "created a Federal Government of limited powers." *Gregory*, 111 S. Ct. at 2399.

While the Court has characterized the standard for reviewing whether Congress is pursuing a permissible end as requiring "defer[ence] to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding," *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981), it has likewise noted that this rational basis must be supported by the "facts and testimony" before Congress. *See, e.g., Katzenbach*, 379 U.S. at 303-04. Consistent with this recognition, the Court frequently has stated that "the mere fact that Congress has said

when particular activity shall be deemed to affect commerce does not preclude further examination by this Court." *Id.* at 303. Thus, in reviewing regulations of intrastate activity under the commerce clause, the Court has engaged in a searching review of the legislative record to determine whether it rationally supports the conclusion that the regulated activity has a substantial effect on interstate commerce. *See id.* at 299-301; *Hodel,* 452 U.S. at 277-280; *Perez,* 402 U.S. at 155-56; *Heart of Atlanta Motel,* 379 U.S. at 252-53.[13]

As these authorities demonstrate, the United States is incorrect in arguing that, in the context of determining whether legislation is within the permissible ends of the commerce power, rational basis review is satisfied by judicial speculation as to whether a state of facts might exist which would support Congress's exercise of this power. In the context of determining whether legislation is within the scope of the commerce power, the rational basis standard requires that Congress have considered evidence that demonstrates that the regulated activity has a substantial effect on commerce. Thus, where in the course of legislative deliberations, conflicting evidence is presented as to a regulated activity's substantial effect on interstate commerce, a court must defer to a congressional finding that it has such an effect.[14] But where

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[13] In *Hodel,* for example, the Court noted that "[t]he Surface Mining Control and Reclamation Act became law only after six years of the most thorough legislative consideration" and that "[c]ommittees of both Houses of Congress held extended hearings during which vast amounts of testimony and documentary evidence about the effects of surface mining on our Nation's environment and economy were brought to Congress's attention." 452 U.S. at 277-79; *see also Perez,* 402 U.S. at 155-56 (detailing legislative record establishing loansharking's substantial effect on interstate commerce).

[14] Likewise, where, as in *Katzenbach* and *Heart of Atlanta Motel,* the legislative record extensively documents that a regulated activity has a substantial effect on interstate commerce such that any findings would be *pro forma* in nature, it may be appropriate to imply a finding.

Congress has failed to make an adequate record, the standard does not allow a court to speculate as to the existence of a state of facts which would support Congress's power to act.[15]

To hold otherwise would create a strong incentive for Congress to refrain from factfinding altogether. This is hardly a desirable result given that factfinding is likely to provide Congress with additional information as to the scope of a purported problem and thus indicate whether it substantially affects interstate commerce, and if it does, what means are appropriate for addressing it. And contrary to the assertions contained in the brief *amicus curiae* filed by various members of Congress, *see* Br. *Am. Cur.* 16 Members of the United States Senate *et al.* 2, it is hardly an onerous requirement to place on Congress given that it routinely holds hearings and makes findings. *See, e.g., Hodel,* 452 U.S. at 277-80; 30 U.S.C. § 201 (setting forth congressional findings showing surface mining's substantial effect on interstate commerce); *Perez,* 402 U.S. at 155-56; Consumer Credit Protection Act, Pub. L. 90-321, § 201 (setting forth congressional findings showing loansharking's substantial effect on interstate commerce).[16]

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[15] The United States confuses two distinct principles in arguing that *FCC v. Beach Communications,* 113 S.Ct. 2096 (1993), is applicable here. Legislative classifications such as those at issue in *Beach* are reviewed more deferentially because of the broad discretion vested in legislatures to choose "the means by which powers [constitutionally] confer[red] are to be carried into execution." *McCulloch,* 17 U.S. (4 Wheat.) at 421. But because Congress does not possess a general police power, "the connection with interstate commerce is itself a jurisdictional prerequisite for any substantive legislation by Congress under the Commerce Clause." *Hodel,* 452 U.S. at 311 (Rehnquist, J., concurring). Accordingly, "Congress must show that the activity it seeks to regulate has a susbtantial effect on interstate commerce." *Id.* at 313.

[16] *Amici* note that after the court of appeals' decision, the Senate passed legislation which amended Section 922(q) to include findings. *See* Pet. Br. 6 n.2. These findings, however, are entitled to no weight because they are not supported by any record. Moreover, this *post hoc* procedure does not satisfy the Constitution's require-

D. Because The Federalization Of Traditional State Crimes Imposes Substantial Costs On The Federal-State Balance And Rights Granted Under State Law, Courts Properly Require Congress To Show That Regulated Activity Has A Substantial Effect On Interstate Commerce

The United States also dismisses the court of appeals' reliance on the line of cases, beginning with *Bass*, in which this Court has held that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly altered the federal-state balance." *See* Pet. Br. 27-31 (quoting *Bass*, 404 U.S. at 349). Noting that "Congress has far greater latitude . . . when its Acts are applied to the activities of private parties who are incidentally subject to concurrent state regulation" rather than to the States as States, Pet. Br. 28, the United States argues that "Congress is not obliged to explain its reasons for legislating, to justify its decisions with findings, or to identify the constitutional source of its authority to act." *Id.* at 30 (citation and footnote omitted). This reasoning ignores the significant costs imposed on the federal-state balance by congressional decisions to federalize traditional state crimes, including the enactment of the Gun-Free School Zones Act.[17]

First, in *amici*'s own experience, enactments such as the Gun-Free School Zones Act interject federal officials into longstanding and close working relationships which

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ment of passage by both Houses and presentment to the President. *See* U.S. Const. art. I, § 7; *INS v. Chadha*, 462 U.S. 919, 945-51, 954 n.18 (1983).

[17] The court of appeals recognized that the clear statement rule is a rule of statutory construction. *See* Pet. App. 48a. Nonetheless, the principle which underlies the rule—that under our constitutional scheme, States are also sovereigns entitled to govern " 'all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State,' " *Gregory*, 111 S.Ct. at 2399 (quoting *The Federalist* No. 45, pp. 292-93 (C. Rossiter ed. 1961) (J. Madison))—likewise suggests that courts must have a meaningful way of determining whether Congress has exercised power in excess of its constitutional limits.

exist between local school administrators, police and prosecutors. The friction caused by federalizing traditional state crimes might be tolerable—assuming these crimes had a substantial effect on interstate commerce—if the federal government had the resources and commitment to prosecute these cases. *See* Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism,* 10 Harv. J.L. & Pub. Pol'y, 117, 126 (1987) (noting that federalization of state crimes has led to "unseemly 'turf' wars"). But as Judge Miner has also noted, "federal law enforcement agencies, prosecutors and courts cannot keep pace with the proliferation of federal crimes." *Id.* It is not clear the federal government has the resources to prosecute such criminal behavior with any regularity. *See Hearing* at 72-73 (noting that there are over 100,000 public schools nationwide and only 1,800 ATF agents). Insofar as the federalization of traditional state crimes offers the promise of a federal solution, it may very well induce complacency in the citizenry. Cf. Miner, *Federal Courts, Federal Crimes, and Federalism,* 10 Harv. J.L. & Pub. Pol'y at 125.[18]

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[18] The federalization of traditional state crimes has also been extensively criticized for the potential burdens it places on the federal courts. *See* Miner, *Federal Courts, Federal Crimes, and Federalism,* 10 Harv. J.L. & Pub. Pol'y at 118 (noting that with the federalization of traditional state crimes, "we have the makings of a glut that threatens to overwhelm the federal courts—courts that were designed to handle a limited number of crimes affecting national interests"); Henry J. Friendly, *Federal Jurisdiction: A General View* 58 (1973) (urging that "[t]he question whether federal criminal prosecutions have not greatly outreached any true federal interest . . . deserves the most serious examination, particularly in light of the tremendous increase in criminal filings . . . ."). *Cf. Report of the Federal Courts Study Committee* 35-37 (1990) (criticizing the growth of federal criminal filings—particularly federal narcotics cases which could be prosecuted as effectively under state law—and noting that "[b]oth the principles of federalism and the long-term health of the federal judicial system require returning the federal courts to their proper, limited role in dealing with crime"); Miner, *Federal Courts, Federal Crimes, and Federalism,* 10 Harv. J.L. & Pub. Pol'y at 124-25 (noting that between 1984 and 1985, "the Southern District of

More significantly, federalizing traditional state crimes only serves to diminish the political accountability of state and local governments. Such legislative action encourages the citizenry to run to Congress to address the latest cause of the day, no matter how tenuous its nexus to interstate commerce and no matter how ill-suited the subject matter is to being regulated through uniform federal rules. In the process, it reduces state and local legislatures to the role of "bench-players" in the governing process. This is truly a regrettable consequence for a constitutional system which has catalogued the many benefits of federalism as including, *inter alia*, "a decentralized government that will be more sensitive to the diverse needs of a heterogenous society," the "increase[d] opportunity for citizen involvement in democratic processes," and the "allow[ance] for more innovation and experimentation in government." *Gregory*, 111 S.Ct. at 2399 (citations omitted).

The federalization of traditional state crimes also diminishes the accountability of local law enforcement officials. As Judge Miner has written:

> The citizenry increasingly has been conditioned to turn to federal law enforcement and to the federal courts as the first line of defense against anti-social conduct. What we are witnessing is an abdication of responsibility for self-government. . . . In the face of municipal corruption, it is easy to send for the 'federals.' If narcotics are sold on the street corners of a major city, it is a simple matter to invoke high-profile federal criminal prosecution. When loan sharks and racketeers infest a municipality, local law enforcement efforts can be relaxed if federal help is on the way.

New York sustained an increase in its *total* criminal caseload of 51.5%, from 695 to 1,053 cases," and asking "[f]rom whence are to come the necessary court facilities and personnel?").

These and other problems created by the federalization of traditional state crimes were extensively discussed at a conference held by the U.S. Attorney General on March 7, 1994.

> But something is lost in the process—the traditions of democratic self-government and of individual involvement and neighborly concern that have been the hallmarks of our society.

Federal Courts, Federal Crimes, And Federalism, 10 Harv. J.L. & Pub. Pol'y at 127; *see also* Friendly, *Federal Jurisdiction: A General View* at 58 ("Is it right to have so many areas where local law enforcement officers can neglect their responsibilities on the basis of an expectation that the 'federals' will do the job?").

While the aforementioned consequences of federalizing traditional state crimes are serious enough to require that Congress demonstrate that it is not acting beyond its delegated powers, even more significant is the threat to state constitutional protections of individual rights posed by enactments such as the Gun-Free School Zones Act. This threat exists, even where, as here, charges brought under the Gun-Free School Zones Act merely duplicate a state prosecution. *See* Pet. App. 2a n.1.

Because the Gun-Free School Zones Act is a federal statute, prosecutions brought under it are governed by federal law. But as the Court has frequently recognized, the States possess the "sovereign right to adopt in [their] own Constitution[s] individual liberties more expansive than those conferred by the Federal Constitution." *Prune-Yard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). *See also Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Sibron v. New York*, 392 U.S. 40, 60-61 (1968); *Cooper v. California*, 386 U.S. 58, 62 (1967); Latzer, *State Constitutions and Criminal Justice* 2-5 (1991); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977). Across a wide range of criminal law issues, many States have adopted more expansive interpretations of individual rights under their state constitutions and statutory law than is required by the federal constitution.[19] *See gen-*

[19] As Justice Brennan has noted, the "[r]ediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions . . . is probably the most

erally Latzer, *State Constitutions and Criminal Justice*; Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. at 498-501.

State decisions to provide their citizens with constitutional and statutory protections which exceed those of the federal constitution are surely "decision[s] of the most fundamental sort for a sovereign entity." *Gregory*, 111 S.Ct. at 2400. It is, after all, "[o]ne of the first duties of government" to protect the civil liberties of its citizens. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Yet such state-created protections are, in effect, preempted in any prosecution brought under the Gun-Free School Zones Act because federal and not state law provides the rules of decision. Thus, while the United States simply ignores the threat to state sovereignty and protections of individual rights posed by the federalization of traditional state crimes, *see* Pet. Br. 27-32, that threat compellingly demonstrates why Congress must be required to establish that conduct it has criminalized has a substantial effect on interstate commerce. Requiring Congress to make this showing is a small price to pay for preserving our Constitution.

As the foregoing demonstrates, the court of appeals properly held that courts should not "simply assume that the concededly intrastate conduct [which Congress prohibited here] substantially affects interstate commerce." Pet. App. 50a-51a. As *amici* have explained above, if Congress is to criminalize intrastate activity, it must make a record to show that the activity has a substantial effect and not just a trivial impact on interstate commerce. Because Congress failed to do so here, its enactment of the Gun-Free School Zones Act was beyond its delegated powers.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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important development in constitutional jurisprudence of our times." Nat'l L.J., Sept. 29, 1986 (Special Supplement), at S-1.

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APPENDIX

State Statutes Prohibiting Gun Possession In Schools And On School Property:

1994 Ala. Acts 817, § 1
1994 Ariz. Sess. Laws 109, § 1
Ark. Code Ann. § 5-73-119(a)(2) (Michie 1993)
Cal. Penal Code § 626.9 (West 1994)
Colo. Rev. Stat. § 18-12-105.5 (1993)
Conn. Gen. Stat. Ann. § 53a-217b (West 1994)
Ga. Code Ann. § 16-11-127.1 (Michie 1992)
Fla. Stat. Ann. § 790.115 (West 1994); Fla. Stat. Ann. § 810.095 (West 1994)
Idaho Code § 18-3302D (1994)
Ind. Code Ann. § 35-47-9-2 (Burns 1994)
Kan. Stat. Ann. § 21-4204(a)(4) (1993)
1994 Ky. Acts 391, § 1
Me. Rev. Stat. Ann. tit. 20-A, § 6552(1) (West 1993)
Md. Ann. Code art. 27, § 36A(a) (1993)
Mass. Ann. Laws ch. 269, § 10(j) (Law. Co-op. 1992)
Mich. Comp. Laws Ann. § 750.234d (1994)
Minn. Stat. § 609.66 Subd. 1d (1993)
Miss. Code Ann. § 97-37-17 (1993)
Mo. Ann. Stat. § 571.030.1(8) (Vernon 1994)
1994 Neb. Laws 988, § 6
Nev. Rev. Stat. Ann. § 202.265 (Michie 1992)
N.J. Stat. Ann. § 2C:39-5(e) (West 1994)
N.M. Stat. Ann. § 30-7-2.1 (Michie 1994)
N.Y. Penal Law § 265.01(3) (McKinney 1994)
N.C. Gen. Stat. § 14-269.2 (1993)
N.D. Cent. Code § 62.1-02-05(1) (1993)
Ohio Rev. Code Ann. § 2923.122 (1993)
Okla. Stat. Ann. tit. 21, § 858 (West 1994); Okla. Stat. Ann. tit. 21, § 1280.1 (West 1994)
Or. Rev. Stat. § 166.370 (1994)
Pa. Stat. Ann. tit. 18, § 912 (1993)
R.I. Gen. Laws § 11-47-60 (1993)

S.C. Code Ann. § 16-23-430 (Law. Co-op. 1993)
S.D. Codified Laws Ann. § 13-32-7 (1994)
Tenn. Code Ann. § 39-17-1309 (1993)
Tex. Penal Code Ann. § 46.04(a)(1) (West 1993)
Utah Code Ann. § 53A-3-502 (1994)
Vt. Stat. Ann. tit. 13, § 4004 (1993)
Va. Code Ann. § 18.2-308.1 (Michie 1994)
Wash. Rev. Code § 9.41.280 (1992)
W.Va. Code § 61-7-11a (1994)

State Statutes Establishing Gun-Free School Zones:

Ill. Ann. Stat. ch. 720, para. 5/24-1 (Smith-Hurd 1994)
La. Rev. Stat. Ann. § 14:95.2 (1994)
Wis. Stat. Ann. § 948.605 (1993)